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No. 06-40

IN THE

# Supreme Court of the United States

EUGENE EVANS,
*Petitioner,*

v.

CITY OF BERKELEY,
*Respondent.*

On Petition for Writ of
Certiorari to the California Supreme Court

## BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL RIGHTS UNION AND CONGRESSMAN DAN LUNGREN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICI CURIAE.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....5

REASONS FOR GRANTING THE WRIT.....7

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT HOLDING THAT GOVERNMENTS MAY NOT PENALIZE CITIZENS FOR EXERCISING THEIR CONSTITIONAL RIGHTS.....7

II. THE DECISION BELOW BUILDS A CONFLICT AMONG THE LOWER COURTS REGARDING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND WHETHER THE RIGHTS OF THOSE ADVOCATING TRADITIONAL MORAL VALUES WILL BE RESPECTED.....15

III. THIS CASE PRESENTS CRITICAL ISSUES OF ONGOING NATIONAL IMPORTANCE CONCERNING THE FREEDOM OF AMERICANS TO JOIN TOGETHER TO ADVOCATE TRADITIONAL MORAL AND RELIGIOUS VALUES.....17

CONCLUSION.....20

## TABLE OF AUTHORITIES

CASES Page

*Anderson v. McCotter,* 100 F.3d 723 (10th Cir. 1996).....13

*Barnes-Wallace v. Boy Scouts of America,*
275 F. Supp. 2d 1259 (S.D. Cal. 2003).....18

*Bd. of Comm'rs, Waubensee County v. Umbehr,*
518 U.S. 668 (1996).....12

*Boy Scouts of America v. Dale,*
530 U.S. 640 (2000).....2,3,5,6,7-8,13,14

*Boy Scouts of America v. Till,*
136 F. Supp. 2d 1295 (S.D. Fla. 2001).....13,18

*Boy Scouts of America v. Wyman,*
335 F.3d 80 (2d Cir.2003).....15,18

*Christian Legal Society v. Kane,* No. C 04-04484 JSW,
2006 WL 997217 (N.D. Cal. Apr. 17, 2006).....17

*Cuffley v. Mickes,* 208 F.3d 702 (8th Cir. 2000),
*cert. denied,* 532 U.S. 903 (2001).....13,16

*Curran v. Mount Diablo Council of the Boy Scouts,*
17 Cal. 4th 670 (1998).....3,4

*FCC v. League of Women Voters,* 468 U.S. 364 (1984).....13

*Gay Lesbian Bisexual Alliance v. Pryor,*
110 F.3d 1543 (11th Cir 1997).....15

*Grove City College v. Bell*, 465 U.S. 555 (1984).....14

*Healy v. James*, 408 U.S. 169 (1972).....11-12

*Hsu v. Roslyn Union Free Sch. Dist. No. 3*,
85 F.3d 839 (2d Cir. 1996).....13,18

*Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992),
*cert. denied*, 508 U.S. 908 (1993).....13

*Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978).....16

*Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001)....13

*Perry v. Sinderman*, 408 U.S. 593 (1972),.....10

*Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development*, 915 F.2d 59 (2d Cir. 1990)
*cert. denied* 500 U.S. 92 (1991).....13

*Powell v. Bunn*, 108 P.3d 37 (Or. Ct. App. 2005).....18

*Randall v. Orange County Council*,
17 Cal. 4th 736 (1998).....3,4,8

*Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004),
*cert. denied, sub. nom. Rahn v. Robb*,
543 U.S. 1054 (2005).....16

*Rumsfeld v. Forum for Academic and Institutional Rights*,
126 S.Ct. 1297 (2006).....12-13

*Rust v. Sullivan*, 500 U.S. 173 (1991).....14

*Rutan v. Republican Party of Illinois,*
497 U.S. 62 (1990).....13

*Speiser v. Randall,* 357 U.S. 513 (1958).....11

*Thomas v. Review Board* 450 U.S. 707 (1981).....11

ARTICLES

Bainbridge, Stephen M., *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act,* 21 J.C. & U.L. 369 (1994).....19

Berg, Thomas C., *Religious Liberty in America at the End of the Century,* 16 J.L. & Religion 187 (2001).....19

Paulsen, Michael S,, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on Equal Access for Religious Speakers and Groups,*
29 U.C Davis L. Rev. 653 (1996).....19

## INTEREST OF AMICI CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct or fit a particular ideology. Those setting ACRU policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Solicitor General, Robert H. Bork; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; George Mason Law School Professor, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This is precisely the sort of case that is of interest to the ACRU because we are concerned that the rights of the Boy Scouts to advance the traditional values in which they believe are fully understood and rightly protected, and not undermined by political correctness.

Congressman Dan Lungren represents the 3rd Congressional District of California. He served as Attorney General of the state of California from 1991 to 1999. In that capacity, he pursued litigation to protect the rights of the Boy Scouts. He is concerned that the constitutional rights of the Boy Scouts to promote their traditional moral values be fully recognized and respected.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU) and Congressman Dan Lungren. No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. Their agreement to consent is enclosed with this brief.

## STATEMENT OF THE CASE

This case involves the constitutional rights of a Boy Scout related organization that serves many disadvantaged youth to advance and remain faithful to the traditional moral values espoused by the Boy Scouts. Though advancing and practicing such traditional moral values is labeled by the Defendant City of Berkeley as discrimination, in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) this Court directly and expressly held that the exact same actions and policies to which the City objects here are constitutionally protected under the right of freedom of expressive association. The question in this case is whether the City may penalize and discriminate against the Scouts for exercising the precise constitutional rights recognized by this Court in *Dale.* We submit that in doing so the City has violated the First Amendment and Equal Protection rights of the Berkeley Sea Scouts and the Boy Scouts.

As this Court noted in *Dale,*

> "Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression."

530 U.S. at 648-649.

The Berkeley Sea Scouts is comprised of volunteers working together in a nonprofit association as a subdivision of the national Boy Scouts of America, operating under the local Mount Diablo Council. App.A-2. Adults serving in the organization use Sea Scout vessels to teach teenage youth sailing and seamanship skills for only $7 a year. Id. The

Berkeley Sea Scouts are known for ethnic diversity and participation by the economically disadvantaged, with membership open to girls as well as boys. Id.

In the late 1930s, the Boy Scout Mount Diablo Council allowed the City of Berkeley to quarry rock from Council property free of charge to build the City's marina and breakwater. App.A-3. The city eventually used 80,000 tons of free rock and fill from the Scout property. App.D-8, D-9. In return, the City began allowing the Sea Scouts to use berths at the marina for free. App.A-3. This arrangement was formalized by City resolutions in 1945 and 1969. Id.

In 1997, the City adopted a new policy by resolution providing free berths to all non-profit community service organizations that met certain criteria. App.A-4. Among these is that use of the berths, "may not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability, or medical condition." App.A-4.

The California Supreme Court below found that the Berkeley "Sea Scouts have never actually discriminated against anyone on the basis of sexual orientation or religion." App.A-2. But the national Boy Scouts, of which the Berkeley Sea Scouts are a part, seek to promote traditional moral values among boys as a central mission of the organization. *Dale,* 530 U.S. at 649-650; *Randall v. Orange County Council,* 17 Cal. 4th 736, 741-742 (1998); *Curran v. Mount Diablo Council of the Boy Scouts,* 17 Cal. 4th 670, 681 (1998). These values include belief in God and in traditional sexual morality, as well as in patriotism, honesty, hard work, etc. *Dale,* 530 U.S. at 649-653; *Randall,* 17 Cal. 4th at 739, 741-742; *Curran,* 17 Cal. 4th at 681-682. Membership is open only to those who accept these values, and not to those who reject them. *Dale,* 530 U.S. at 651-653;

*Randall,* 17 Cal. 4th at 741-742; *Curran,* 17 Cal. 4th at 681-682. Consequently, membership is not open to those who embrace atheism or homosexuality. Id. In *Dale,* this Court held that the Boy Scouts have a constitutionally protected right to maintain these policies as part of expressing their beliefs and carrying out their mission, and the organization cannot be prohibited from maintaining these policies by anti-discrimination laws.

The Waterfront Commission that administers the marina asked the Berkeley Sea Scouts for a "local policy statement" ensuring that the group would not engage in discrimination, even though no other non-profit organization seeking free berths at the marina was asked for such a statement. App.A-5. The Sea Scouts provided the Commission a letter stating its policies, and the Commission recommended that the free berths for the group going back to the 1930s be continued, as the Scouts met all of the criteria for the new program providing free berths to eligible non-profit community service organizations. App.A-5. But the City Council rejected continued participation by the Sea Scouts in this program on the grounds that it disapproved of the national Boy Scout policies regarding atheism and homosexuality, found such policies to be discriminatory, and concluded that the Sea Scouts statement did not pledge not to follow those policies. App.A-6 to A-7.

In response, 14 individual adult and youth participants in the Berkeley Sea Scouts sued the City on behalf of themselves and other program participants alleging that the City had violated their First Amendment and Equal Protection rights under the U.S. Constitution. App.A-2, A-8, D-1 et seq. Among those Plaintiffs is Eugene Evans, who has participated in the Berkeley Sea Scouts program since he was age 13 in 1957. App.D-6. He is the most senior of the active Berkeley Sea Scouts, having served as a Sea Scout

Skipper, analogous to Troop Leader, for over 27 years. Id. Because of the loss of the free berths at the Berkeley marina, Evans, a career California school teacher, now personally pays over $500 per month in berth fees for the Sea Scouts. Id. As a result, Evans is now unable to pay the membership fees of disadvantaged youths. Id. He is also unable to continue to pay for community outreach and formerly free services and events such as cruises, meals, and overnight camping trips sponsored by the Sea Scouts, resulting in a loss of these services and events to the community. App.D-6 to D-7.

The trial court sustained the City's demurrer, and the Court of Appeal and California Supreme Court affirmed. Review of the constitutional claims brought by the Plaintiffs is now sought by this Court. *Amici* American Civil Rights Union and former California State Attorney General Dan Lungren urge this Court to grant such review because the City of Berkeley has violated the constitutional rights of Plaintiffs based on the precedents of this Court, the decision below is in conflict with those precedents, the lower courts are in conflict on the underlying constitutional doctrines and need guidance, and this case presents important questions of Federal constitutional law which are critical to the freedom of all Americans to pursue and advance traditional moral values.

## SUMMARY OF ARGUMENT

In *Boy Scouts of America v. Dale,* 530 U.S. 640, 644 (2000), this Court held that the Boy Scouts cannot be forced by anti-discrimination laws to accept openly gay adult leaders and members. The freedom of the Scouts, including its subdivision Berkeley Sea Scouts, to choose their own leaders and members is protected by the right of expressive association under the First Amendment. The exact same

reasoning applies to protect the Boy Scout policy regarding atheists.

Yet, it is indisputable that the City of Berkeley penalized the Sea Scouts, and the Boy Scout organization of which they are a part, precisely because the Scouts insisted on reserving their freedom to exercise these exact same constitutional rights recognized by this Court in *Dale*. But under the well-established precedents of this Court, Berkeley may not penalize the Sea Scouts and the Boy Scouts for exercising their constitutional rights, or reserving the right to do so.

This is not a case where the government is simply choosing who and what to subsidize. The Berkeley City government has already chosen to fund free berths at the city marina for organizations just like the Sea Scouts and Boy Scouts. But Berkeley has excluded the Scouts solely because of their exercise of constitutional rights expressly and directly recognized by this Court. The Scouts otherwise meet all the criteria for participation in the program, the benefits of which they have enjoyed for 70 years. Berkeley may not do this under our Constitution.

The decision of the court below builds a trend among the lower courts to fail to protect the constitutional rights of those who believe in traditional moral values from penalties imposed on the exercise of those rights by state and local governments. This has created a conflict among the circuits and other courts over whether government may, indeed, penalize the exercise of constitutional rights.

More fundamentally, this case presents crucial legal issues of national importance, for what is at stake here is the freedom of Americans to join together to defend, advocate, and teach traditional moral and religious values. Millions of

Americans who believe deeply in these values are looking to this Court to uphold their constitutional rights and equal treatment under the law.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT HOLDING THAT GOVERNMENTS MAY NOT PENALIZE CITIZENS FOR EXERCISING THEIR CONSTITIONAL RIGHTS.

In *Boy Scouts of America v. Dale,* 530 U.S. 640, 644 (2000), this Court said, "The Boy Scouts is a private, not for profit organization engaged in instilling its system of values in young people. The Boy Scouts assert that homosexual conduct is inconsistent with the values it seeks to instill." The Court also said, "The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight'... and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,'..." 530 U.S. at 651.

In that case, the Boy Scouts dismissed James Dale as an adult scout leader because he had become an openly public, gay activist. Dale sued claiming discrimination under the state's public accommodations law, and the New Jersey Supreme Court upheld Dale's claim, ordering the Boy Scouts to reinstate him.

But this Court reversed. The Court held that applying the New Jersey discrimination law to the Boy Scouts in this way would violate the organization's right to expressive association under the First Amendment.

The Court explained that the First Amendment protects the right of the Boy Scouts to choose and send the messages it desires, and to express and teach the values in

which it believes. The Court recognized that forcing the Boy Scouts to accept publicly avowed, practicing homosexuals as members and adult leaders would nullify its message, teachings, and expression regarding traditional moral values and sexual conduct. As the Court said,

> "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express....
>
> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."

530 U.S. at 648.

The same points apply to the Boy Scout policy regarding atheists. The Boy Scouts wish to instill in boys the value that it is important to believe in God. *Randall v. Orange County Council,* 17 Cal.4th 736, 741-742 (1998). If the Boy Scouts are forced to admit as members and adult leaders individuals who openly express that they do not believe in God, then the ability of the Scouts to teach this value will be destroyed. The very membership and leadership of these individuals would send the message that it is not important to believe in God.

Yet, it is indisputable that the City of Berkeley penalized the Sea Scouts, and the Boy Scout organization of which they are a part, precisely because the Scouts insisted on reserving their freedom to exercise these exact same constitutional rights recognized by this Court in *Dale.* The City demanded that the Sea Scouts provide a statement proclaiming as a matter of organizational policy that they

would never exercise these constitutional rights. The Sea Scouts tried to placate the City in various ways, but in the end they did not provide such a statement, because of their fealty to the national policies of the Boy Scout organization. It cannot be denied that it was precisely because of this refusal to provide the statement promising to never exercise these constitutional rights that the City then refused to allow the Sea Scouts continued free use of the berths which they had enjoyed going back all the way to the 1930s, when the Scouts contributed to the very building of the berths and the marina.

Indeed, the court below says precisely this over and over again. The court said,

> "But here there is no dispute the basis for the city council's action was…BSA's 'discriminatory policies against gays and atheists,' which…made it impossible for the Sea Scouts to give a complete and unambiguous guaranty against future discrimination."

App.A-27. The court also said,

> "The city asked for full assurances that the program posed no threat of future discrimination, but it did not receive them. In light of BSA's policies, which, as counsel conceded in this court, [the Sea Scouts] would have to follow, Berkeley reasonably concluded that the Sea Scouts' representations were inadequate to assure future compliance with the city's nondiscrimination rules."

App.A-26. In its own conclusion, the court said, "Berkeley discontinued the Sea Scouts' berth subsidy because the program was unable, consistent with the enforced policies of BSA, to provide adequate assurances of future

nondiscrimination." App.A-28. The court also said that Berkeley denied

> "a subsidy to a BSA program that refused to state an unambiguous local policy of nondiscrimination, instead pointedly reserving the right to discriminate against openly gay and atheistic participants."

App.A-25. App.A-9("Berkeley reasonably concluded the Sea Scouts did not and could not provide satisfactory assurances because of their required adherence to BSA's discriminatory policies."); App.A-24("In the April 8 letter, the Sea Scouts, in effect, reserved the right to discriminate against avowedly gay or atheistic participants"); App.A-21 to A-22; App.A-26 to A-27.

But under the well-established precedents of this Court, Berkeley may not penalize the Sea Scouts and the Boy Scouts for exercising their constitutional rights, or reserving the right to do so. As this Court said in *Perry v. Sinderman,* 408 U.S. 593, 597 (1972),

> "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such

> interference with constitutional rights is impermissible."

(quoting *Speiser v. Randall,* 357 U.S. 513 (1958).

Similarly, in *Thomas v. Review Board* 450 U.S. 707, 716 (1981), this Court said, "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." In *Speiser*, this Court said that for a state government to "deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for such speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech" 357 U.S. at 518.

The Court applied this doctrine of unconstitutional conditions in *Healy v. James*, 408 U.S. 169 (1972). A Connecticut state college denied official recognition and access to university facilities to a student organization because it was affiliated with the national Students for a Democratic Society (SDS), allegedly a subversive organization. The Court held this action unconstitutional as it violated the First Amendment's right of freedom of expressive association. The Court said, "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." 408 U.S. at 181. The Court also said,

> "The Constitution's protection is not limited to direct interference with fundamental rights....Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle government interference."

Id. at 183 (citations omitted).[2]

In addition, in *Bd. of Comm'rs, Waubensee County v. Umbehr,* 518 U.S. 668 (1996), this Court said, "our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected… freedom of speech' even if he has no entitlement to that benefit." Id. at 674. The Court also said, "constitutional violations may arise from the deterrent, or chilling, effect of governmental [policies] that fall short of a direct prohibition against the exercise of First Amendment rights." Id.

This Court recently explained an important distinction in the unconstitutional conditions doctrine in *Rumsfeld v. Forum for Academic and Institutional Rights,* 126 S.Ct. 1297 (2006). It stated that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." 126 S.Ct.at 1307. That case involved the Solomon Amendment, which required colleges and universities receiving Federal funds to provide military recruiters equal access to recruiters from other potential employers on campus. The Court held,

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[2] The court below quite wrongly stated that *Healy* actually supports Berkeley's action in this case, App.A-24. It referenced *Healy* as saying "the government could legitimately demand assurances that an individual or group would not engage in the same prohibited activities as the larger organization with which the individual or group was associated…. Specifically, the high court held that a local Students for a Democratic Society chapter's 'equivocation' regarding the use of violent and disruptive tactics could warrant denying the group official recognition." App.A-24 to A-25. But the SDS did not have a constitutional right to engage in violent and disruptive tactics. In the present case, however, the Sea Scouts and the Boy Scouts do have a constitutional right expressly recognized by this Court to engage in the conduct for which Berkeley has penalized them.

> "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."

Id. In other words, since Congress could constitutionally enact a law requiring colleges and universities to grant military recruiters the same access and treatment as other recruiters, even without any federal funds, it certainly could condition receipt of federal funds on providing such equal access and treatment to military recruiters.

But in the present case, Berkeley could not directly impose on the Sea Scouts and the Boy Scouts the requirement that they not exclude avowed gays and atheists. Berkeley is prevented from doing this by the exact holding of this Court in *Dale*. Therefore, Berkeley could not deny the Sea Scouts and the Boy Scouts participation in a program otherwise available to them on the condition that they not exclude avowed gays and atheists.[3]

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[3] For further support for the unconstitutional conditions doctrine see, *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development*, 915 F.2d 59 (2d Cir. 1990) *cert. denied* 500 U.S. 92 (1991); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001); *Anderson v. McCotter*, 100 F.3d 723 (10th Cir. 1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001)(School district could not ban Scouts from school facilities due to supposed discrimination because "the School Board cannot punish another group for its own message protected under the First Amendment.").

This is not a case like *Rust v. Sullivan,* 500 U.S. 173 (1991), where the government is simply choosing what to fund, and decides to fund one policy alternative and not another. In the present case, the Berkeley City government has already chosen to fund free berths at the city marina for organizations just like the Sea Scouts and Boy Scouts. But Berkeley has excluded the Scouts solely because of their exercise of constitutional rights expressly and directly recognized by this Court. Berkeley may not do that under our Constitution.

This is also not a case like *Grove City College v. Bell,* 465 U.S. 555 (1984), where a federal statute required colleges to agree not to discriminate on the basis of sex in any program receiving federal funds. This Court held that it was not unconstitutional for the federal government to cut off its funds to Grove City College when the school refused to provide a statement assuring compliance with the ban on sex discrimination. But in that case, Grove City did not have any constitutional right to engage in sex discrimination. Indeed, there was not even an expressive association issue in that case, as Grove City simply sought to resist the federal government asserting control over schools through its education funding. The Court held there that the Constitution did not prevent the federal government from attaching strings to its funding. But in the present case, again the Sea Scouts and the Boy Scouts do have a constitutional right to maintain their policies advancing traditional moral values as expressly and directly recognized by this Court.

In summary, in the present case, the Berkeley city government penalized the Sea Scouts and the Boy Scouts precisely for exercising the exact same constitutional rights recognized by this Court in *Dale.* That penalty took the form of denying participation by the Sea Scouts and the Boy

Scouts in a generally available program for those just like the Scouts, except for the exercise by the Scouts of their recognized constitutional rights. Indeed, the Sea Scouts and the Boy Scouts had enjoyed the benefits of the program for over 70 years until the city government banned them. Under the numerous precedents of this Court discussed above, the Constitution prevents the city government from imposing such a penalty on the exercise of constitutional rights. The decision of the court below upholding that penalty consequently conflicts with the numerous precedents of this Court discussed above.

## II. THE DECISION BELOW BUILDS A CONFLICT AMONG THE LOWER COURTS REGARDING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND WHETHER THE RIGHTS OF THOSE ADVOCATING TRADITIONAL MORAL VALUES WILL BE RESPECTED.

The decision of the court below builds a trend and a growing conflict in light of the 2nd Circuit decision in *Boy Scouts of America v. Wyman,* 335 F.3d 80 (2d Cir.2003). In that case, the state of Connecticut excluded the Boy Scouts from participating in the state's workplace charitable contribution campaign again because of the exercise by the Scouts of the exact same constitutional right recognized by this Court in *Dale*, exclusion of avowed gays from membership and leadership in the organization. The 2nd Circuit nevertheless allowed the state of Connecticut to impose this penalty on the exercise by the Scouts of this explicitly recognized constitutional rights.

In contrast, in *Gay Lesbian Bisexual Alliance v. Pryor,* 110 F.3d 1543 (11th Cir 1997), a state statute prohibited any college or university from spending public funds to sanction, recognize, or support any group that

promotes a lifestyle or other actions prohibited by sodomy or sexual misconduct laws. The 11th Circuit struck down as unconstitutional this penalty on the exercise of First Amendment rights by the organization to promote the values in which it believes.

Indeed, organizations that promote traditional moral values are so disfavored that even the rights of the truly reprehensible Ku Klux Klan are better protected in the circuit courts. *Robb v. Hungerbeeler,* 370 F.3d 735 (8th Cir. 2004), *cert. denied, sub. nom. Rahn v. Robb,* 543 U.S. 1054 (2005)(state of Missouri could not exclude local unit of the Ku Klux Klan from the state's Adopt-A-Highway program because of the Klan's racially restrictive membership policy); *Cuffley v. Mickes,* 208 F.3d 702 (8th Cir. 2000), *cert. denied, sub. nom. Yarnell v. Cuffley,* 532 U.S. 903 (2001); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.,* 578 F.2d 1122 (5th Cir. 1978) (School Board decision to deny Klan use of a high school gym for a Saturday night meeting because of the Klan's racially discriminatory practices was overturned).

Consequently, the decisions of the court below and of the 2nd Circuit in *Wyman* are in conflict with the above decisions of the 11th Circuit,the 8th Circuit, the 5th Circuit, and all of the decisions of this Court discussed above. This pattern of decisions shows a particular bias against those who wish to advocate traditional moral values. We urge the Court to take this case to clear up this confusion and ensure that the rights of those who wish to advocate traditional moral values are respected and protected as much as those of anyone else.

## III. THIS CASE PRESENTS CRITICAL ISSUES OF ONGOING NATIONAL IMPORTANCE CONCERNING THE FREEDOM OF AMERICANS TO JOIN TOGETHER TO ADVOCATE TRADITIONAL MORAL AND RELIGIOUS VALUES.

What is at stake in this case is the freedom of Americans to join together to defend, advocate, and teach traditional moral and religious values. Their conduct in forming organizations to express such viewpoints is increasingly labeled as discrimination. If they try to hold such organizations together by only choosing as leaders and members those who believe in such values, they are increasingly told by their government that this amounts to a violation of local anti-discrimination laws, or at least that what they are doing is so socially unacceptable that they must be excluded from government programs and activities, and the public square.

As a result, the University of California's Hastings School of Law denied official recognition and funding to a Christian student club because it requires its members to sign a statement of faith and to follow Christian sexual morality, including non-participation in homosexual conduct. Organizations promoting homosexual conduct, however, are fully recognized and funded by the school. The Federal District Court for Northern California recently upheld the school's action. *Christian Legal Society v. Kane,* No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006).

In Oregon, a public school barred the Boy Scouts from making informational presentations on school grounds because of its "discriminatory" policies regarding atheists and gays, even though other community organizations with different beliefs were allowed to do so. A state appellate

court has upheld that school's action. *Powell v. Bunn,* 108 P.3d 37 (Or. Ct. App. 2005).

In San Diego, because of the religious values of the Scouts, a Federal district court has held unconstitutional a lease of parkland to the Scouts for the building and maintenance at Scout expense of a first class campground open to the general public on an equal basis. *Barnes-Wallace v. Boy Scouts of America,* 275 F. Supp. 2d 1259 (S.D. Cal. 2003).

In Connecticut, the Boy Scouts are banned from the state employee charitable workplace campaign because they are a "discriminatory" organization for teaching traditional moral values to boys concerning belief in God and sexual conduct. But remaining as participants in good standing in the charitable campaign are organizations expressing quite opposite views, such as the Stonewall Foundation, the Lambda Legal Defense and Education Fund, and Parents, Families & Friends of Lesbians and Gays. As discussed above, the 2nd Circuit has upheld this state action. *Wyman.*

In New York, a college Christian group was told it was in violation of anti-discrimination requirements because it would not accept non-Christians as officers of the organization. The students had to arrange a lawsuit to get their constitutional rights enforced. *Hsu v. Roslyn Union Free School Dist. No. 3,* 85 F. 3d 839 (CA2), *cert denied,* 519 U.S. 1040 (1996).

In Broward County, Florida, the school board banned the Scouts from the public schools on the grounds that they were a discriminatory organization for upholding traditional moral values regarding homosexual conduct. It took a lawsuit by the Scouts to get their clear constitutional rights respected by local school officials. *Till, supra.*

And in the present case, nonprofit groups are allowed to berth their boats rent free at the Berkeley city marina. But not the Boy Scouts, who contributed the basic building blocks of the marina 70 years ago.

See, Thomas C. Berg, *Religious Liberty in America at the End of the Century,* 16 J.L. & Religion 187 (2001); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on Equal Access for Religious Speakers and Groups,* 29 U.C Davis L. Rev. 653 (1996); Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act,* 21 J.C. & U.L. 369 (1994).

The Boy Scouts of America is an organization run by parents and local community volunteers coming together to instruct young boys in the traditional moral values in which they believe. These values include the importance of maintaining faith in God and belief in traditional sexual morality. To call this activity discrimination is overheated hyperbole by those who simply oppose these traditional moral beliefs. The Boy Scouts do not discriminate. They engage in the teaching of traditional moral values, a constitutionally protected activity that a state may not prohibit or penalize.

Those with different beliefs have constitutionally protected rights to start their own youth organizations teaching their preferred moral values. But they may not use the power of the state to impose their values and beliefs on those who disagree. This is an untenable result that has no roots in the will of the people.

If, because of their traditional values, the Boy Scouts are a discriminatory organization that can be penalized for exercising their constitutional rights, then what will happen in the future to Catholic schools and their youth groups because of their teachings and practices? What will happen to schools and youth groups sponsored by evangelical Protestant churches? Most directly threatened are the many organizations that have sprung up across the country to advance traditional moral values. If the Court does not address these issues now, the problem will fester and grow, causing greater and greater social discord.

Millions of Americans who believe in traditional moral and religious values are looking to this Court to uphold their constitutional rights and equal treatment under the law. For these reasons, the decision of the court below merits review.

## CONCLUSION

For all of the foregoing reasons, *Amici Curiae* The American Civil Rights Union and Congressman Dan Lungren respectfully urge this Court to grant the Writ of Certiorari requested by the Petitioner.

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